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December 3, 2010

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Rachel D. Campbell
Director
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: M&G Polymers USA, LLC v. CSX Transportation, Inc., STB Docket No. 42123

Dear Ms. Campbell:

Enclosed for filing in the above-referenced matter is Defendant CSX Transportation Inc.'s ("CSXT's") Reply to the Appeal of Decision Denying the Motion to Compel of M&G Polymers USA, LLC. The filing includes an original and ten copies of CSXT's Reply.

Please stamp one copy of CSXT's Reply to indicate it has been received and filed and return the stamped copy with our messenger for our files. Thank you for your assistance in this matter.

If you have questions, please contact the undersigned.

Very truly yours,

G. Paul Moates
Matthew J. Warren

Enclosures

cc: Jeffrey O. Moreno

BEFORE THE
SURFACE TRANSPORTATION BOARD

M&G POLYMERS USA, LLC. Complainant, v. CSX TRANSPORTATION, INC. and SOUTH CAROLINA CENTRAL RAILROAD COMPANY Defendants.	228368 Docket No. NOR 42123

CSX TRANSPORTATION, INC.'S REPLY IN OPPOSITION TO APPEAL OF DECISION DENYING MOTION TO COMPEL OF M&G POLYMERS USA, LLC

Defendant CSX Transportation, Inc. ("CSXT") respectfully submits this Reply to the Appeal filed by Complainant M&G Polymers USA, Inc. ("M&G") appealing the November 24, 2010 decision ("Decision") by the Director of the Office of Proceedings ("Director") denying M&G's motion to compel CSXT to produce its internal management costing system. Appeals of the Director's decisions on motions to compel are subject to "a stringent standard of review,"[1] under which the appellant may prevail only if it demonstrates that "[t]he ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party." 49 C.F.R. § 1115.9(a)(4). M&G does not even *mention* this standard of review in its appeal of the Decision, let alone provide any argument that the Director's decision affirming well-settled Board precedent precluding the discovery of railroad internal costing data meets the high and demanding standards for § 1115.9(a)(4) appeals.[2]

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[1] *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket Nos. 42099, 42100, 42101 (Jan. 15, 2008).

[2] Total Petrochemicals USA, Inc. has filed a nearly identical appeal in STB Docket No. 42121 from the Director's decision denying a similar motion to compel production of internal costing

M&G's failure to acknowledge the high standard that it must (and cannot) meet is just one of many failures and omissions in this Appeal. Most importantly, M&G fails to provide any coherent justification for the Board to reverse its decision in *Potomac Electric Power Co. v. CSX Transportation, Inc.*, 2 S.T.B. 290, 292, 294 (1997) ("*PEPCO*"), which concluded that railroad internal costing systems were not relevant to qualitative market dominance and rejected arguments nearly identical to the one M&G raises here. And M&G simply ignores the multiple post-*PEPCO* decisions reaffirming that internal railroad costing systems are not discoverable "for any purpose" in rate reasonableness proceedings. *Arizona Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 2 S.T.B. 367, 371-72 (1997). Nor does M&G provide any reason for the Board to abandon the policy that formed the foundation of the Director's Decision – the Board's well-established policy that variable costs in rate reasonableness proceedings are to be determined by the Uniform Rail Costing System ("URCS"). Decision at 3. If M&G wishes to make market dominance arguments based on the variable costs of CSXT rail service, it is free to use URCS for that purpose. There is no cause for the Board to reverse a decision by the Director that applied well-settled and well-reasoned precedent to deny M&G's request that the Board compel production of information that it has repeatedly held is not discoverable for any purpose in rate reasonableness proceedings.

I. M&G CANNOT MEET THE HIGH STANDARD FOR APPEALS OF THE DIRECTOR'S DECISION.

Pursuant to 49 C.F.R. § 1114.31(a)(4), appeals of a Director decision on a motion to compel may be lodged with the Board pursuant to the appellate rules set forth at 49 C.F.R. § 1115.9. As the Board made clear when it adopted § 1115.9, that section "appl[ies] a highly

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information in that proceeding. CSXT is submitting separate replies to the motions in these two separate proceedings.

deferential standard concerning interlocutory appeals of decisions of Board employees." *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption, and Revocation Proceedings*, 1 S.T.B. 754, 769 (1996). Section 1115.9 provides that decisions by a Board employee (including the Director), may be appealed under § 1115.9 "only if

(1) The ruling denies or terminates any person's participation;

(2) The ruling grants a request for the inspection of documents not ordinarily available for public inspection;

(3) The ruling overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents; or

(4) The ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

§ 1115.9(a)(1-4) (emphasis added). This high standard accords with Part 1115's admonition that appeals from employee decisions "are not favored" and "will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." § 1115.1(c).[3] The Board has strictly applied these limitations, and routinely denies appeals failing to meet this standard. *See Wisconsin Power & Light v. Union Pac. R.R. Co.*, STB Docket No. 42051 (June 21, 2000) (denying appeal from ALJ's discovery decision and holding that "[w]e apply a highly deferential standard of review to such appeals"); *Dakota, Minn. & E. R.R. Corp.—Construction*

[3] Sections 1115.1(c) and 1115.9(a) each set forth standards for review of appeals from Board employee decisions. While these two standards appear to overlap to some extent, they are not contradictory and accord similar deference to initial employee decisions. *Cf. U.S. Magnesium, LLC v. Union Pac. R.R. Co.*, STB Docket No. 42114 at 2 & n.2 (Nov. 16, 2009) (noting that appeal from employee decision would not satisfy either § 1115.1(c) or § 1115.9(a)). To the extent that the "clear error of judgment" or "manifest injustice" standard were to apply to this appeal, the same arguments set forth herein with respect to Rule 1115.9(a) apply equally to show M&G has not – and could not – meet those standards.

into the Powder River Basin, 3 S.T.B. 847, 859 (1998) (denying appeal from ALJ discovery decision because appellant did not satisfy "the strict standard" for such appeals).[4]

Under § 1115.9, the only potentially applicable ground for appealing a denial of a motion to compel is subsection 4: "substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party."[5] M&G's appeal can meet none of these standards. First, M&G has not alleged any irreparable harm from the Board's decision. Nor could it. As is detailed below, M&G has no need for the information it has requested, both because it can (and should) use URCS costs to support any variable cost arguments it wishes to make and because the "comparison" M&G seeks to make between CSXT variable costs and the internal costs of other transportation providers would be impossible without access to internal costs and costing systems of those alternative providers. *See infra* Section III. Second, the Director's affirmation of the Board's policy against permitting discovery of internal railroad costing systems certainly is not harmful to the public interest, let alone a "substantial detriment to the public interest." Finally, M&G has not alleged or suffered any undue prejudice. M&G is not unfairly prejudiced by being denied access to information that no previous SAC litigant has been permitted to obtain and that is not relevant to any issue in this case.[6] Because M&G has utterly failed to even

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[4] *See also U.S. Magnesium, LLC v. Union Pac. R.R. Co.*, STB Docket No. 42114 (Nov. 16, 2009); *Central Oregon & Pac. R.R., Inc.—Abandonment and Discontinuance of Service—In Coos, Lane & Douglas Ctys., OR*, STB Docket No. AB-515 (Sub-No. 2) (Aug. 1, 2008); *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (Oct. 20, 2006); *Tongue River R.R. Co., Inc.—Construction & Operation—Western Alignment*, STB Fin. Docket No. 30186 (Sub-No. 3) (Sept. 30, 2003).

[5] Subsections 1-3 are inapplicable to any decision denying a motion to compel. Subsection 1 applies only to decisions not involve the participation of a party, and subsections 2 and 3 could only apply to certain situations in which a motion to compel was granted.

[6] For the above reasons, M&G similarly has not demonstrated "a clear error of judgment" or "manifest injustice" sufficient to constitute exceptional circumstances under § 1115.1(c).

address – let alone meet – its burden of proof, the Board should deny the appeal without further consideration.

II. THE DIRECTOR PROPERLY FOLLOWED BOARD PRECEDENT HOLDING THAT INTERNAL COST DATA IS NOT DISCOVERABLE.

M&G's initial motion to compel asserted that "Board Precedent Permits Discovery Of CSXT's Internal Costs For the Purpose Of Proving Market Dominance." M&G Motion to Compel ("Motion") at 6 (filed Nov. 4, 2010).[7] That stark misstatement of Board precedent, which was not supported by a single citation to a Board case so holding, has been abandoned by M&G on appeal. But even after being reminded by the Director that "[t]he Board has been clear and consistent in its prior determinations that internal costing data are not discoverable in rate reasonableness proceedings," Decision at 3, M&G persists in misreading and attempting to minimize that clear and consistent precedent. The Director was correct that M&G's arguments are foreclosed by the Board's many previous decisions denying similar requests for internal railroad costing systems.

CSXT's Reply explained that "a well-established line of precedent" – including at least seven separate decisions over the last thirteen years – holds that internal management costing systems (and internal profitability assessments) are not discoverable for any purpose in rate reasonableness proceedings. *Entergy Arkansas, Inc. et al. v. Union Pacific R.R. Co. et al.*, STB Docket No. 42104, at 4 (May 7, 2008); *see* CSXT Reply at 6-8.[8] The seminal decision on

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[7] M&G attached its Motion as an exhibit to the Appeal. To the extent that M&G intended to thereby incorporate the Motion's arguments into its Appeal, CSXT refers the Board to its Reply to the Motion, which thoroughly responded to M&G's arguments. *See* CSXT Reply to Motion to Compel (filed Nov. 15, 2010) (hereby incorporated by reference).

[8] *See Kansas City Power & Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42095, at 2 (Feb. 15, 2006) ("*KCP&L*"); *Northern States Power Co. Minnesota d/b/a Xcel Energy v. Union Pacific R.R. Co.*, STB Docket No. 42059, at 8-9 (May 24, 2002); *Texas Mun. Power Agency v. Burlington No. & Santa Fe Ry. Co.*, STB Docket No. 42056, at 3-4 & n.8 (Feb. 9, 2001)

discoverability of internal costing information is *PEPCO*, in which the Board considered and rejected a complainant's arguments that it needed access to CSXT's internal management costing system in order to develop evidence of qualitative and quantitative market dominance and stand-alone costs. *See* 2 S.T.B. at 291-94. Significantly, PEPCO's argument that CSXT's internal costing system was relevant to qualitative market dominance is almost identical to M&G's argument here – PEPCO claimed that internal costs could be used to show that a railroad's profit margin "'demonstrate[s] that competition does not pose a very effective constraint' on the rates charged by the railroads." *See id.* at 294. In *PEPCO* the Board rejected this argument expressly and unequivocally, holding that "we do not use rate-cost relationships as a basis for qualitative market dominance determinations." *Id.* Despite M&G's denials, it is making virtually the same relevance argument that PEPCO did – namely, that M&G wishes to use CSXT's internal costing system "to prove that the transload alternatives identified by CSXT are not an effective competitive constraint upon CSXT's rates" because of CSXT's profit margin on M&G's traffic. Appeal at 3. This argument was squarely rejected by the Board in *PEPCO*, and the Director's decision to adhere to that precedent was eminently reasonable.[9]

The Director recognized that the Board has repeatedly reaffirmed *PEPCO*'s holding that "internal costing data are not discoverable in rate reasonableness proceedings."

("*TMPA*"); *Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry. Co.*, 4 S.T.B. 64, 73 (1999) ("*Minnesota Power*"); *Arizona Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 2 S.T.B. 367, 371-72 (1997); *PEPCO*, 2 S.T.B. 290, 292-94 (1997).

[9] The Board also rejected PEPCO's claims that internal costing systems would be relevant to quantitative market dominance; the Board held that the Uniform Rail Costing System ("URCS") was the measure of variable costs in rate proceedings, and that outputs from a railroad's internal costing system could not be substituted for URCS costs. *See id.* at 292-93. M&G's claim that the Board's prior statements holding that URCS costs are to be used for all regulatory purposes are only dicta "because the Board was not asked to address the relevance of internal costs to qualitative market dominance in any of those decisions" is not accurate. *PEPCO* squarely held both that internal costs were not relevant to market dominance and that URCS (not internal management costs) is to be used to measure variable costs in rate proceedings.

Decision at 3. M&G would have the Board disregard all these prior decisions on the theory that any case in which the complainant did not repeat PEPCO's argument that internal costing information was relevant to qualitative market dominance evidence does not apply to M&G's request for production of CSXT's internal management cost information. On the contrary, the Board's repeated, broad, and unequivocal pronouncements that internal costing data is not relevant "for any purpose" in rate reasonableness proceedings – which in no way suggested that there was an exception for internal costs allegedly relevant to qualitative market dominance – are controlling precedent that the Director rightly followed.[10]

Indeed, the Director was bound to adhere to the Board's "clear and consistent" holdings that internal management costing systems are not discoverable, because M&G did not satisfy the high standard required of any party seeking "to relitigate issues that have been resolved in prior cases." *General Procedures for Presenting Evidence in Stand Alone Cost Rate Cases*, 5 S.T.B. at 446 ("Unless new evidence or different arguments are presented, we will adhere to precedent established in prior cases."). M&G did not present "new evidence" or "different arguments" (or even acknowledge that it was required to do so). Instead M&G recycled the argument that the Board rejected in PEPCO – that internal costs would help M&G determine the profitability of CSXT's traffic and thus whether alternative transportation options could provide an effective competitive constraint.

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[10] *Arizona Public Service Co.*, 2 S.T.B. at 372 (Board "would not use a carrier's internal costing system for any purpose in our analysis and decision" (emphasis added)); *see, e.g.*, *TMPA*, at 3 n.8 ("Because our Uniform Railroad Costing System (URCS) is the exclusive methodology for developing costs in a rail rate complaint proceeding, proprietary costing systems are irrelevant."); *KCP&L*, at 2 ("Generally, it is contrary to Board precedent to require a party to produce internal management costing information, because costs in Board proceedings are to be determined using the Board's Uniform Rail Costing System (URCS)."); *Minnesota Power*, 4 S.T.B. at 73 ("DMIR's costing system and studies produced by that system are not relevant to this proceeding.").

It should be reiterated, however, that the question before the Board is not whether *PEPCO* was rightly decided, or even whether the Director rightly applied *PEPCO* and its progeny to deny M&G's motion to compel. The only question in this Appeal is whether the Director's decision was "a clear error in judgment" or constituted "substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party." §§ 1115.1(c); 1115.9(a). It plainly was not, and the Appeal must be denied.

III. M&G'S CLAIMED RATIONALE FOR SEEKING INTERNAL COST DATA IS ILLOGICAL.

CSXT's Reply pointed out that the only reason M&G asserted in support of its desire to obtain internal cost information was illogical, because the supposed "comparison" M&G intended to make between CSXT's revenue-to-internal-cost ratio and that of other transportation providers would be impossible for M&G to make. It is telling that M&G's Appeal does not include any response to this point. The fact that M&G has no practical need for the information it seeks is a further reason supporting the Director's decision to deny the Motion.

The only reason M&G put forth in its Motion to justify its extraordinary demand for all documents, computer programs, and databases related to CSXT's internal management costing system is that M&G would like to obtain "discovery of CSXT's internal costs in order to demonstrate that CSXT operates at a large cost advantage relative to any intermodal options that CSXT may contend are effective competitive constraints." Motion at 5. This claim makes little sense, because M&G could not make the comparison necessary to support such a showing unless it also has the internal costs of other transportation providers. M&G could not obtain those internal costs through discovery, and other rail carriers, trucking providers, and transload facility operators certainly would not provide such highly sensitive information voluntarily.

The discovery M&G seeks from CSXT is plainly not sufficient to demonstrate a CSXT "cost advantage" over intermodal options. Even if the Board were to grant M&G access to CSXT's internal costing system, M&G could not evaluate (let alone prove) any alleged "cost advantage" for CSXT's rail service over "any intermodal options" without also obtaining the internal costing systems and data from nonparty providers of those intermodal options. Motion at 5. For example, M&G indicates that it would like to compare CSXT's internal costs for particular rail movements to the costs of potential rail-truck transloading alternatives for those movements in order to assess whether transloading is an effective competitive option. *See* Appeal at 3-4. But to perform such a comparison, M&G would need not just CSXT's internal costs, but also (1) internal costs for the nonparty railroad providing rail service to the transload facility; (2) internal costs for the transload facility operator; and (3) internal costs for the trucking operator providing service to the ultimate destination. M&G has no right to obtain internal costing systems from nonparties in discovery.[11] And it defies credulity to think that railroads, trucking companies, and transload facility operators would voluntarily provide highly confidential internal costing information to a shipper like M&G. M&G's Appeal is devoid of any explanation of how M&G plans to prove the allegedly higher internal costs of transloading alternatives.

Moreover, even if M&G somehow obtained internal costing data from relevant non-party transportation providers, there is no reason to believe that such data would be comparable to those generated by CSXT's internal costing systems. *Cf. PEPCO*, 2 S.T.B. at 293 (noting that railroads' internal costing models are "unique application[s]"). Railroads' internal management costing systems are based on a multitude of assumptions and carrier-specific

[11] *See* 49 C.F.R. § 1114.26(a) (providing for service of interrogatories on other parties only); *id.* § 1114.30(a) (providing for requests for production only to other parties).

characteristics, and assumptions and parameters used by CSXT in developing its models are almost certainly different from those used by other transportation providers.[12] As the Board noted in *PEPCO*, permitting use of internal costing models would require the Board and the parties to undertake the "daunting, time-consuming task" of examining and assessing the assumptions and mechanics of each model. *Id.*

Regardless, even if M&G sought to argue that the difference between CSXT's rate for a M&G movement and its variable costs for that movement are relevant to qualitative market dominance, the appropriate measure of railroad costs is not costs derived from an internal management costing system, but rather URCS costs. The Board's consistent rejection of motions to compel production of internal costing systems has been motivated in part by the fact that "costs in Board proceedings are to be determined using the Board's Uniform Rail Costing System." *KCP&L* at 2; *see TMPA* at 3 n.8 ("Because our Uniform Railroad Costing System (URCS) is the exclusive methodology for developing costs in a rail rate complaint proceeding, proprietary costing systems are irrelevant."). Here, if M&G believes that the variable costs of CSXT's rail service over a particular issue movement are somehow relevant to whether CSXT has market dominance over that movement, it may use the Board's approved regulatory costing system to calculate those costs.

M&G claims that it wishes to use CSXT's internal costing systems and not URCS because in the ordinary course of business railroads rely on their internal costing systems to assess variable costs, not URCS. *See* Appeal at 4. This directly contradicts the logic of *PEPCO*, in which the Board recognized the significant advantages of utilizing URCS as a single regulatory costing system as opposed to attempting to adapt carriers' complex and divergent

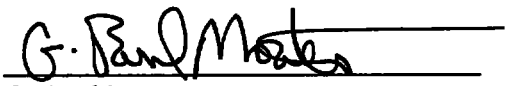
[12] Many trucking companies and transload operators may not even have internal costing models.

costing systems for use in rate reasonableness proceedings. Whether URCS is the costing system used by CSXT "in the real world" is irrelevant. Appeal at 4. URCS is "the exclusive methodology for developing costs in a rail rate complaint proceeding," and M&G is able to (and indeed is required to) use it to develop any variable costs it wishes to use to support its evidence. *TMPA*, at 3 n.8.

IV. CONCLUSION

For the above reasons, M&G's Appeal of the Director's Decision Denying M&G's Motion to Compel should be denied.

Respectfully submitted,



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Counsel to CSX Transportation, Inc.

Dated: December 3, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2010, I caused a copy of the foregoing Reply to Appeal of Decision Denying Motion to Compel to be served on the following party by hand delivery and electronic mail:

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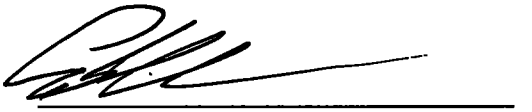

Eva Mozena Brandon